PUBLIC PROSECUTOR

v.

JONG FATT CHONG

HIGH COURT SABAH & SARAWAK, KUCHING
PUAN ELIZABETH CHAPMAN JC
[CRIMINAL APPEAL NO: 42-06-96-III]
25 MAY 1996

CRIMINAL LAW: *Jurisdiction - Whether the Court has the power to discharge amounting to acquittal without hearing evidence from the prosecution - Consideration of Criminal Procedure Code, ss. 254(i), (ii), (iii) & 376(i).*

The respondent was charged under s. 4(c) of the Prevention of Corruption Act 1961. He claimed trial but after the testimony of only one prosecution witness, the case was adjourned as the prosecution was unable to proceed with other witnesses. On 25 June 1991, the case was adjourned *sine die* by the learned Sessions Court Judge. Thereafter, the case was adjourned several more times until a final adjournment was granted by the Court. Finally, on 24 January 1994, the Court ordered that the accused (the respondent) be discharged and acquitted as the prosecution was unable to proceed without a key witness who could not be traced. The Public Prosecutor appealed.

The only issue was whether the Court had the power to discharge amounting to an acquittal. The respondent, relying on s. 254(iii) of the Criminal Procedure Code, submitted that the Court had such a power.

Held:

Section 254(iii) should be read together with s. 254(i) and (ii) for it is clear that s. 254 applies to a case where the prosecution declines to prosecute further. This is not the situation in the case before this Court. Under s. 376(i) of the Criminal Procedure Code, the Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code and the Court has no power to acquit the accused before the end of the prosecution case.

Per Curiam:

It is apparent that the trial had been adjourned several times and that the respondent has had a charge hanging over him since 1989. When there is no reasonable prospect of a case proceeding as a result of the absence of one or more witnesses or for some other cogent reason, then the prosecution should act under s. 254 of the Criminal Procedure Code. But that seems not to be the case here and the lethargic manner in which this case was conducted leaves much to be desired. An accused person should not be allowed to suffer

from the dilatoriness of the prosecution by leaving the charge hanging over his head for an indefinite period of time. The Court now leaves it to the good sense and conscience of the prosecution to decided whether it should further prosecute this case.

[Appeal allowed. Order of Court below reversed and substituted with an order of discharge not amounting to acquittal.]

Cases referred to:
Public Prosecutor v. Zainuddin bin Sulaiman & Ors. [1986] 1 CLJ 468 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, s. 254(i), (ii), (iii), 376(i)
Prevention of Corruption Act 1961, s. 4(c)

For the appellant - Ahmad Zubir Jantan, DPP
For the respondent - Chong Siew Chiang; M/s. Chong Bros

JUDGMENT

Elizabeth Chapman JC:

The respondent was, in this case, charged under s. 4(c) of the Prevention of Corruption Act, 1961. He claimed trial to the charge and according to the record of the lower Court, after one prosecution witness was called and had given evidence the trial of the case was adjourned as the prosecution was unable to proceed with the witnesses. I am unable to ascertain from the record why the prosecution was not able to proceed with the witnesses as the reason was not stated therein.

The Sessions Court Judge further adjourned the hearing *sine die* which, in my view, should not have been done as the next hearing date should have been fixed. It is further noted that neither the prosecution nor the defence Counsel who represented the respondent at the hearing requested that the date of hearing be fixed. This was on 25 June 1991. The following year the trial was again adjourned, this time by the Court. Following that there was another adjournment by the Court and the reason given was that the presiding Sessions Court Judge was not available. Then, finally, on 11 October 1993 when the case came up for hearing the prosecution applied for an adjournment as one of the key witnesses was untraced. The Court granted a final adjournment and on 24 January 1994 the Court discharged and acquitted the respondent because the prosecution was not ready to proceed on that day as one key witness remained untraced. Against this order of discharge and acquittal the Public Prosecutor now appeals.

There is only one issue before this Court, that is, whether the Court has the power to discharge amounting to an acquittal. In submitting that the Court had such a power learned Counsel for the respondent relied on s. 254(iii) of the Criminal Procedure Code which stipulates that:

> Such discharge shall not amount to an acquittal unless the Court so directs.

However, s. 254(iii), in my view, should be read together with s. 254(i) and (ii) for it is clear that s. 254 applies to a case where the prosecution declines to prosecute further. This is not the situation in the case before this Court. Under s. 376(i) of the Criminal Procedure Code the Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code and the Court has no power to acquit the accused before the end of the prosecution case. In *Public Prosecutor v. Zainuddin bin Sulaiman & Ors.* [1986] 1 CLJ 468 the Deputy Public Prosecutor applied under s. 66 of the Courts of Judicature Act to have the following question of law on public interest determined:

> In view of Article 143(3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right in law for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution?

It was held:

> (1) The Court has no power to acquit an accused before the end of the prosecution case. Whether the evidence has been given or not the phrase "all such evidence as may be produced" appearing in s. 173(c) of the Criminal Procedure Code (the Code) has the same meaning as the phrase "all the evidence hereinbefore referred to" in s. 173(f) of the Code. But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted.
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> (2) Under s. 376 of the Code and Article 145(3) of the Constitution, the Attorney-General has the power to control and direct all criminal prosecutions and proceedings. Since the Attorney-General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused.

In this instant case too the Court below had no power to discharge the respondent amounting to an acquittal. The appeal is, therefore, allowed. The order of the Court below is reversed and substituted thereof an order of discharge not amounting to an acquittal.

There is one observation I would like to make in this case. It is apparent from the record that the trial had been adjourned several times and that the respondent has had a charge hanging over him since 1989. I would have

thought that when there is no reasonable prospect of a case proceeding as a result of the absence of one or more witnesses or for some other cogent reason then the prosecution should act under the provisions of s. 254 of the Criminal Procedure Code. But that seems not to be the case here and the lethargic manner in which this case was conducted leaves much to be desired. There is no indication that the prosecution was going to withdraw the charge and one would have thought that subjecting the respondent to further agony is morally, if not legally, wrong. An accused person should not be allowed to suffer from the dilatoriness of the prosecution by leaving the charge hanging over his head for an indefinite period of time. Having decided that the law does not permit the Court to discharge and acquit the accused before the end of the prosecution case I now leave it to the good sense and conscience of the prosecution to decide whether it should further prosecute this case.

Reported by Cindy Chan